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No. 79-1683

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

FIRST BEVERAGES, INC. OF LAS VEGAS, ET AL., *Petitioners*

v.

ROYAL CROWN COLA CO.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR ROYAL CROWN COLA CO. IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-31) is reported at 612 F.2d 1164. The district court's judgment was entered upon general verdicts of the jury.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1980. The petition for writ of certiorari was filed on April 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, under *Continental T.V. Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), and in light of the jury's finding of reasonableness after seven weeks of trial, the court of appeals correctly affirmed the trial court's application of and jury instructions concerning the traditional rule of reason standard for assessing the antitrust legality of vertical territorial restrictions?

2. Whether the court of appeals correctly determined that, as a factual matter and based upon a careful review of the entire record, no improper *pari delicto* or "unclean hands" affirmative defense had been permitted at trial?

3. Whether the court of appeals correctly affirmed the jury's award of compensatory counterclaim damages under instructions which required a finding of actual injury as a prerequisite to any recovery?

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, 15 U.S.C. § 15, are set forth at Pet. App. B 32-33, 35.

STATEMENT

Royal Crown Cola Co. (Royal Crown)[1] is a manufacturer of concentrates used for producing trademarked soft drinks. It sells concentrates to its trademark licensees or "bottlers" who use these concentrates as the key ingredient in manufacturing finished

[1] Now Royal Crown Companies, Inc. Reference here will be to the company as it was named at the time of trial.

soft drinks according to strict standards imposed by Royal Crown. Royal Crown's licensing agreements give the bottlers the right to purchase soft drink concentrates, to manufacture bottled soft drinks and to sell finished soft drink products under Royal Crown's trademarked names in an exclusive geographic territory. All major soft drink companies in the United States use similar exclusive territorial distribution systems. (Pet. App. A 2-3.)

Petitioner First Beverages, Inc. of Las Vegas (First Beverages) was, during portions of 1969 and 1970, the licensed bottler of Royal Crown products in the Las Vegas, Nevada area.[2] In July of 1970, First Beverages and other petitioners secretly made arrangements to sell large quantities of soft drinks to a Southern California supermarket chain located in the exclusive territory of Royal Crown's Los Angeles bottler. Petitioners sought to disguise these transactions by use of various intermediaries and shipped the products into Los Angeles by unlicensed "gypsy" truckers operating without Interstate Commerce Commission (ICC) authorization.[3] Within a few months, after some correspondence between Royal Crown and First Beverages, the Los Angeles shipments ceased when First Beverages disposed of its bottling operations to another company. (Pet. App. A 3, 5-6.)

[2] First Beverages was established and controlled by petitioner Wilmer R. Norton as a corporate subsidiary of Norton's Phoenix contract canning operation, petitioner Norton Packaging, Inc. of Arizona.

[3] H&M, a Los Angeles food broker, originally set up the sales and employed petitioner Mae-Con Enterprises, Inc., a Las Vegas food distributor, to arrange the "gypsy" trucking operation (Pet. App. A 5).

Approximately four years later, First Beverages and other petitioners filed suit against Royal Crown alleging that Royal Crown's exclusive territorial licensing and other actions violated the antitrust laws. Royal Crown responded that its trademark licensing agreements were lawful and asserted counterclaims against all petitioners. These counterclaims charged breach of contract by First Beverages, as well as an antitrust conspiracy among all petitioners to undermine and disrupt Royal Crown's distribution system. (Pet. App. A 6.)

Prior to trial, petitioners filed numerous motions for a ruling that Royal Crown's licensing agreements were a *per se* violation of the antitrust laws. The district court denied these motions and a full "rule of reason" trial was held concerning the economic effects and competitive impact of Royal Crown's vertical territorial distribution system (Pet. 10-11). This trial, which lasted seven weeks before Hon. Malcolm Lucas and a jury, developed a comprehensive factual examination of the "reasonableness" issue in almost 5,500 pages of trial transcript and some two hundred separate exhibits.

In the final days of trial, and based on the full factual record then available, Judge Lucas reconfirmed his numerous pretrial rulings and again concluded that Royal Crown's territorial restrictions should be judged under the rule of reason, rather than a *per se* standard. Accordingly, he gave a traditional jury instruction which closely paralleled the statement of the rule of reason articulated in *Chicago Board of Trade*[4] and

[4] *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918).

which petitioners conceded was a correct statement of the law. The jury thereupon found for Royal Crown both on petitioners' claims and on Royal Crown's counterclaims. Judgment was entered upon the jury's verdicts and Royal Crown was awarded a total of $8,000 in damages plus costs and a reasonable attorney's fee. (Pet. App. A 6-7, 12.)

On appeal, the Ninth Circuit issued a detailed thirty-page opinion analyzing and rejecting all of petitioners' present contentions. Specifically, the court of appeals held that: (1) consistent with this Court's decision in *GTE Sylvania*,[5] Judge Lucas properly applied and correctly instructed the jury concerning the traditional "rule of reason" standard for vertical territorial restraints (Pet. App. A 7-12); (2) based on a "careful review of the record," no improper *pari delicto* or "unclean hands" defense had been permitted at trial (Pet. App. A 14-22); and (3) Royal Crown was properly awarded compensatory damages on its counterclaims for injury actually sustained (Pet. App. A 22-24).

ARGUMENT

The petition presents no question warranting review by this Court. Petitioners were afforded every opportunity to develop and present their case during the comprehensive, seven-week "rule of reason" trial below. They failed, however, to persuade either Judge Lucas or the jury that Royal Crown's territorial trademark licensing system was in any way unreasonable, let alone "manifestly anti-competitive" so as to justify *per se* prohibition.

[5] *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).

In these circumstances, the court of appeals correctly affirmed that the trial court's application of the traditional rule of reason standard and related jury instructions were completely consistent with this Court's holding in *GTE Sylvania*. Similarly, based on a "careful review" of the extensive trial record, the court of appeals further ruled that petitioners' claims concerning *pari delicto*, unclean hands and nominal damages were without factual support. This litigation was thus decided correctly on the basis of its own particular facts. The decisions below raise no conflict between circuits, nor do they present any issue of importance or precedent under federal law which this Court ought to review.

I. The Court Below Correctly Applied A Traditional Rule Of Reason Analysis To The Vertical Territorial Restrictions At Issue.

The important question of appropriate antitrust analysis for vertical restrictions was fully addressed by this Court just three years ago in *GTE Sylvania*. There, the Court ruled that such restrictions are to be governed by the traditional rule of reason standard, rather than a *per se* approach (433 U.S. at 57-59). Although not foreclosing the possibility that particular applications of vertical restrictions might justify *per se* prohibition, the Court made clear that departure from the rule of reason standard must be based upon "demonstrable economic effect" meeting the "demanding standards" of *Northern Pacific Railway Co.*[6] (*id.* at 49-50, 58-59). The Court specifically applied this analysis to the territorial-type restrictions at issue

[6] *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1 (1958).

both in *GTE Sylvania* and in the earlier *Schwinn* case[7] and found no "pernicious effect on competition" or "lack of any redeeming virtue" necessary to justify a *per se* rule. To the contrary, the court expressly recognized that vertical territorial restrictions often promote interbrand competition and achieve economic efficiencies in the distribution process. (*Id.* at 54-58.)

Consistent with this Court's ruling in *GTE Sylvania*, the trial court denied multiple pretrial motions for a ruling that Royal Crown's territorial trademark licensing agreements were *per se* illegal; instead, it ordered a comprehensive rule of reason inquiry to explore fully the economic effects and overall competitive impact of the Royal Crown distribution system.[8] At the close of the seven-week trial, with the entire evidentiary record available, the district court reconfirmed its earlier determination that there was no factual predicate for a *per se* rule and, accordingly, instructed the jury on the traditional rule of reason

[7] *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

[8] Although trial was held in August, September and October, 1976 prior to issuance of this Court's *GTE Sylvania* opinion, the en banc opinion of the Ninth Circuit in that case, which this Court later affirmed, was available to and controlling on the district court. In addition, Judge Lucas was also guided by the *Northern Pac. R. Co.* standards for application of *per se* rules, as well as by a substantial body of precedent holding that the territorial trademark licensing system employed by Royal Crown and the rest of the soft drink industry should be judged under a traditional rule of reason, rather than a *per se*, analysis. *E.g.*, *Booth Bottling Co.* v. *Beverages Int'l, Inc.*, 361 F.Supp. 340 (E.D. Pa. 1973); *Royal Crown Bottling Co.* v. *Royal Crown Cola Co.*, 358 F.Supp. 290 (D. Colo. 1972); *In re Royal Crown Cola Co.*, FTC Docket 8858, 3 Trade Reg. Rep. (CCH) ¶ 24,470, Order Denying Partial Summary Decision (June 14, 1973); *Tomac, Inc.* v. *Coca-Cola Co.*, 418 F.Supp. 359 (C.D. Cal. 1976).

standard. On appeal, the Ninth Circuit properly affirmed this ruling based upon this Court's *GTE Sylvania* analysis of economic considerations relating to vertical territorial restrictions (Pet. App. A 7-10).

Contrary to their present assertions (Pet. 16, 20), petitioners were afforded a full and complete opportunity to introduce evidence as to the competitive impact of the Royal Crown distribution system during the exhaustive rule of reason trial below. The jury, however, considering the extensive evidentiary record, determined that Royal Crown's licensing agreements and actions were entirely reasonable. Petitioner's failure to carry their burden of proof under the traditional rule of reason standard negates, *a fortiori,* the "pernicious" and "manifestly anti-competitive" effects necessary to justify a *per se* prohibition.[9]

General Beverage Sales Co. v. *East-Side Winery,* 568 F.2d 1147 (7th Cir. 1978), and *Lamp Liquors, Inc.* v. *Coors Co.,* 563 F.2d 425 (10th Cir. 1977), relied on by petitioners, are not in conflict. In each of those cases the trial court had mechanically applied the now discredited *Schwinn per se* rule and pretermitted all in-

[9] As Justice Stevens recently observed in *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 476 (1978) (separate opinion):

> [P]roperly understood, rule-of-reason analysis is not distinct from "*per se*" analysis. On the contrary, agreements that are illegal *per se* are merely a species within the broad category of agreements that unreasonably restrain trade; less proof is required to establish their illegality, but they nonetheless violate the basic rule of reason.

Because the restraint involved here was tested under the full rule of reason analysis and found by the jury to be perfectly legal and reasonable, it cannot be so "lack[ing] of any redeeming virtue" as to justify *per se* treatment.

quiry into the economic impact of the challenged restraints. In light of *GTE Sylvania,* the Seventh and Tenth Circuits properly reversed and remanded for a rule of reason trial, admonishing that "a *per se* prohibition would be justified only when the threshold of economic harm set forth in *Northern Pacific R. Co.* is reached" (*Lamp Liquors,* 563 F.2d at 432; *see General Beverage,* 568 F.2d at 1154). Here, by contrast, petitioners were given a full and fair opportunity to present relevant competitive effects evidence and simply failed to carry their burden of proof that Royal Crown's licensing agreements and actions were unreasonable.

In summary, the district court and the court of appeals rulings below are entirely consistent with this Court's analysis in *GTE Sylvania.* Petitioners were entitled to—and received—a full rule of reason trial on their antitrust challenge to the Royal Crown distribution system. Further review by this Court is therefore unwarranted.

II. The Trial Court's Rule of Reason Instruction, Affirmed By The Court Of Appeals, Was Without Legal Error.

The trial court's instruction to the jury recited essentially verbatim this Court's statement of the rule of reason in *Chicago Board of Trade* (Pet. App. A 12). Petitioners did not object to the charge at trial and, in fact, expressly "*conceded* that this instruction was a correct statement of the rule of reason" (*id.,* emphasis added).

This Court's decision in *GTE Sylvania* did not overrule the *Chicago Board of Trade* formulation, nor suggest that this traditional statement of the rule of

reason was legally inadequate, as petitioners now assert (Pet. 25-26). To the contrary, the *GTE Sylvania* opinion quotes at length, and with apparent approval, Mr. Justice Brandeis' seminal articulation of the rule of reason standard (433 U.S. at 49 n.15).[10] Subsequently, in *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 691 (1978), this Court further reconfirmed that "the Rule of Reason has remained faithful to its origins" and that "[f]rom Mr. Justice Brandeis' opinion for the court in *Chicago Board of Trade* to the Court opinion written by Mr. Justice Powell in [*GTE Sylvania*]," the Court has adhered to a consistent rule of reason analysis.

Numerous courts of appeals have also considered whether *Chicago Board of Trade* remains a correct statement of the rule of reason in light of the *GTE Sylvania* decision. In each case, the answer has been in the affirmative. *E.g., Eastern Scientific Co.* v. *Wild Heerbrugg Instruments, Inc.,* 572 F.2d 883, 885 (1st Cir.) (quoting with apparent approval the *Chicago Board of Trade* formulation after the *GTE Sylvania* decision), *cert. denied,* 439 U.S. 833 (1978); *Martin B. Glauser Dodge Co.* v. *Chrysler Corp.,* 570 F.2d 72, 82 & n.20 (3d Cir. 1977) (*GTE Sylvania* did not "affect the analysis under the rule of reason test"), *cert. denied,* 436 U.S. 913 (1978); *Hecht* v. *Pro-Football, Inc.,* 570 F.2d 982, 995-96 (D.C. Cir. 1977) (requiring full *Chicago Board of Trade* charge after *GTE Sylvania*), *cert. denied,* 436 U.S. 956 (1978).[11]

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[10] The Ninth Circuit's en banc decision in *GTE Sylvania* had also cited *Chicago Board of Trade* as the "classic form" of the rule of reason (537 F.2d 980, at 1001). That decision, later affirmed by this Court, was binding on the district court at trial.

[11] *Dougherty* v. *Continental Oil Co.,* 579 F.2d 954, 960 (5th Cir. 1978), cited by petitioners, is not to the contrary. In that case, the trial court had charged the jury on the elements of a *per se* violation under *Schwinn*. The court of appeals properly reversed, holding that, in light of *GTE Sylvania,* remand was necessary for a full rule of reason inquiry. Because a *Schwinn per se* charge had been given, rather than a rule of reason instruction, the court of appeals had no occasion to and did not address the legal adequacy of the classic *Chicago Board of Trade* formulation.

Similarly, petitioners' reliance (Pet. 27-28) on the Federal Trade Commission's decision in *Coca-Cola Co.,* 91 F.T.C. 517 (1978), is equally misplaced. There, the FTC did apply a rule of reason, rather than a *per se,* analysis (*id.* at 616) and actually quoted *Chicago Board of Trade* with approval (*id.* at 612 n.12). In all other respects, the FTC's decision is inapposite in that it was rendered under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; was based upon a factual record entirely different from the one below; and is now on appeal to the courts and therefore not yet final.

Petitioners further suggest that, because *GTE Sylvania* had not yet been decided, there was insufficient development and consideration of economic evidence concerning competitive effects at trial (Pet. 27-28, 32). As the court of appeals observed, however, such a suggestion is inconsistent with the evidentiary record:

> The Supreme Court and this court indicated before the trial in this case that both interbrand and intrabrand competition must be considered under the antitrust laws. *See, e.g., White Motor Co.* v. *United States,* 372 U.S. at 268-70 (Brennan, J., concurring), *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. at 369-70, 379-82; *GTE Sylvania, Inc.* v. *Continental T.V., Inc.,* 537 F.2d at 1000-01.
>
> [Petitioners] also apparently recognized that both interbrand and intrabrand competition and their relationship should be considered. During their opening statement, H & M and Mae-Con indicated that they would present evidence that the restriction involved had anticompetitive effects on both intrabrand and interbrand competition. Royal

> Crown also addressed this issue in its opening statement. Moreover, evidence concerning the effects of the restriction here challenged on both interbrand and intrabrand competition was presented at trial.
>
> Therefore, we reject [petitioners'] contention that they were not aware of the importance of both interbrand and intrabrand competition prior to the Supreme Court's discussion of them in *GTE Sylvania.* (Pet. App. A 28.)

In summary, the trial court's rule of reason instruction was drawn from *Chicago Board of Trade* and included language subsequently cited with approval by this Court both in *GTE Sylvania* and in *National Society of Professional Engineers.* The jury properly applied this traditional charge in finding, based on seven weeks of evidence and legal argument, that the overall competitive effect and impact of Royal Crown's distribution system was reasonable. Retroactive framing of new rule of reason jury instructions, as petitioners now request, would be a peculiarly inappropriate and unwarranted exercise for this Court.

III. The Court Of Appeals Properly Found That, As A Factual Matter, Royal Crown Presented Neither An "Unclean Hands" Nor A *Pari Delicto* Defense At Trial.

Petitioner's argument concerning alleged "unclean hands" and *pari delicto* defenses (Pet. 33-39) presents no issue of law for this Court's consideration. The legal principles applicable to such defenses are already well established. In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 214 (1951), this Court held that plaintiff's participation in illegal activity unrelated to alleged anticompetitive conduct by

defendant would not bar plaintiff's antitrust action. Similarly, in *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 138-141 (1968), the Court ruled that plaintiff's own participation in a challenged restraint (*in pari delicto*) is equally unavailable as an affirmative defense.

In its opinion below, the court of appeals did not disregard or question the validity of these precedents. Instead, based on a full review of the extensive evidentiary record, the court of appeals correctly determined that, as a factual matter, no "unclean hands" or *pari delicto* defenses had been presented at trial.

With respect to *Perma Life,* the court of appeals "carefully reviewed the record and pay[ed] particular attention to the testimony and argument that [petitioners] contend tends to establish and emphasize the *pari delicto* defense" (Pet. App. A 15). Indeed, after oral argument, the court of appeals specifically requested supplemental briefs from the parties providing "volume, page and line references to the record and reporter's transcript at which appears the evidence [petitioners] describe as presentation of the *pari delicto* defense" (Order, dated August 17, 1979). Based on this careful review, the court of appeals' concluded:

> Here, the jury was never presented with evidence or argument that [petitioners'] acquiesence and participation in, and advocacy of, the territorial restrictions contained in the Royal Crown franchise agreement was somehow improper and therefore precluded recovery on the antitrust claim. Moreover, the [trial] court properly refused to give an *in pari delicto* instruction. Under such circumstances, we reject [petitioners'] contention

that an improper *pari delicto* defense was presented. (Pet. App. A 16-17.)

The court of appeals similarly determined that, consistent with the *Kiefer-Stewart* doctrine, Royal Crown had not, in fact, been permitted to raise an "unclean hands" affirmative defense based on petitioners' trucking arrangements (Pet. App. A 17-22). Evidence concerning shipping rates and methods was admitted at trial solely on the question of lost net profits, a matter petitioners themselves had put in issue (*id.* at 17-18).[12] Both the argument of counsel and the trial court's detailed instructions on damage calculations (*id.* at 18-19) properly limited the jury's consideration of such evidence to the lost profits issue. As the court of appeals summarized:

> After careful review of the record, we find that the jury was never informed by the district court's instructions, by Royal Crown's closing agrument, or by Royal Crown's manner of presenting the evidence, that the illegality of the trucking arrangement might constitute a complete affirmative defense. (Pet. App. A 19-20.)

The court of appeals thus correctly rejected petitioners' "unclean hands" and *pari delicto* arguments based on the particular facts of this litigation. Petitioners' request that this Court now reexamine the entire evidentiary record of the seven-week trial below to validate the court of appeals' factual determinations should be declined.

[12] Thus, Royal Crown's evidence established (a) that petitioners' "gypsy" truckers charged considerably less than the ICC prescribed minimum rate, (b) that the ICC would have acted promptly to halt the unauthorized shipments, and (c) that projected shipping costs in petitioners' net profit calculations would have to be adjusted upward to reflect these eventualities.

IV. The Court Of Appeals Correctly Affirmed The Jury's Verdicts And Awards Of Compensatory Damages On Royal Crown's Counterclaims.

At trial, Royal Crown presented substantial evidence of a conspiracy among petitioners designed to injure Royal Crown's business by disrupting the Royal Crown trademark licensing system (Pet. App. A 5). Although Royal Crown demonstrated some $18,000 to $20,000 of actual damages due to petitioners' actions, it voluntarily scaled down the amount of compensatory damages claimed to $500 per party on each counterclaim (*id.* at 23).

Consistent with Section 4 of the Clayton Act, 15 U.S.C. § 15, the trial court properly instructed the jury that proof of actual injury was necessary for Royal Crown to prevail on its antitrust claims. These instructions, which are reviewed in detail in the court of appeals' decision (*id.* at 23-24), explicitly required the jury to "determine whether the conspiracy proximately caused injury to Royal Crown . . . and, if so, the amount of damages." The jury evaluated the evidence in light of this charge and awarded Royal Crown the full amount of compensatory damages requested (*i.e.*, $8,000 after trebling).

Contrary to petitioners' present argument (Pet. 40-42), the trial court thus did not instruct the jury that it could award Royal Crown "nominal damages" irrespective of whether or not actual injury had been sustained. As the court of appeals found:

> The term ["nominal damages"] was used merely as a shorthand expression denoting that Royal Crown had limited its request for damages due to actual injury to a nominal amount; it was not used in the technical legal sense to mean damages

awardable without proof of actual injury. (Pet. App. A 24.)

Because the jury is presumed to have followed its instructions, it had to find that Royal Crown was actually injured before returning a verdict in any amount (*id.*).

Moreover, once actual injury arising from an antitrust violation is established, there is no legal impediment to an award of damages which is merely small or nominal in size. Numerous recent federal court decisions expressly confirm that the award of antitrust damages which may be nominal in amount is entirely appropriate. *E.g., Morning Pioneer, Inc.* v. *Bismarck Tribune Co.*, 493 F.2d 383, 390 (8th Cir.) (affirming award of three dollars trebled demages), *cert. denied*, 419 U.S. 836 (1974); *Knutson* v. *Daily Review, Inc.*, 468 F.Supp. 226, 240 (N.D. Cal. 1979) (awarding nominal damages of three dollars); *Newberry* v. *Washington Post Co.*, 438 F.Supp. 470, 483 (D.D.C. 1977) (awarding nominal treble damages of nine dollars).

Accordingly, petitioners' "nominal damages" argument was properly rejected by the court of appeals as inconsistent with the trial record; *i.e.*, the jury was specifically instructed that it must find actual injury before returning a verdict for Royal Crown on its counterclaims. The court of appeals' factual determination was correct and presents no issue warranting further review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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